

No. 12,242

IN THE

United States Court of Appeals
For the Ninth Circuit

OVE FOG,

Appellant,

vs.

R. C. WILLIAMS & Co., INC. (a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

RICHARD TUM SUDEN,
605 Market Street, San Francisco 5, California,
*Attorney for Appellant
and Petitioner.*

FILED

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PAUL P. O'BRIEN,
CLERK

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*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellant respectfully requests a rehearing in the
above entitled matter.

A rehearing is requested because the opinion of this
court in deciding this appeal indicates that the court
has fallen into the same misconception of the issues
as did the trial court.

This court, as did the trial court, came to the con-
clusion that the appellant was informed of *all the*

material facts when he executed the compromise agreement. This court further held in harmony with the trial court that certain facts, which admittedly appellant could not have known, were not of “material significance.”

We assert that the unknown facts were of the greatest materiality for had they been known to appellant he never would have entered into the compromise agreement.

It cannot be denied that the grossest misrepresentations were made to appellant as to who was selling the Harwood Whiskey in his territory. These misrepresentations were not expressions of opinion or left to inferences. They were positive and active misrepresentations made with the object, purpose and intent of convincing Mr. Fog that he was not entitled to commissions. These misrepresentations were made from beginning to end and during the entire relationship and particularly at the time the compromise was effected. The parties making these misrepresentations were Mr. Fog's superiors and were the only ones in possession of the knowledge of the real facts. He was entitled to rely upon their statements. And he did rely upon their assurances that R. C. Williams & Co. did not sell it, that it was a “different deal” and that they “regretfully” could not pay him his commissions which they assured him he was not entitled to.

We say again that Mr. Fog was informed orally and in writing, and these writings are in evidence, that Williams & Co. was simply doing the shipping,

billing and clearing as a matter of accommodation for the distillery. He was told furthermore that Williams & Co. were paying the agents and salesmen for the distillery but that this money originally came from the distillery. (R. 127.) Nothing could have been further from the truth.

True the trial court grasped upon the fact that at one time in a letter from Ackerman on February 6, 1945 (Ex. 11, R. 126), Mr. Fog was informed that Williams & Co. "do not make more than \$1.00 per case on all the Harwood that is sold". The trial court and this court, too, construed that to mean that Williams & Co. was making a "profit" of \$1.00 per case. In this it was in error. The word "making" is subject to many other meanings. It could have been a fee, a commission or a form of compensation distinct from a profit. The scope of the use of this word could mean many things. Certainly it is not limited to "profit". Certainly the use of the word "making" was not inconsistent with the explanation given Mr. Fog that they were only accommodating the distillery so as to put him on notice that the explanations and representations made to him were false.

When Mr. Fog commented in his letters on the fact that Williams & Co. were making \$1.00 per case he received a reply from Mr. Ravaud on March 5, 1945 that "Williams & Company has given up the idea of making a profit on Harwood, but will probably handle it just as an accommodation for the salesmen and distributors". (Exhibit 13, R. 145.) This of course

was false and made only to convince Mr. Fog that he was not entitled to commissions.

Important is the fact that the misrepresentations were reiterated and repeated after the date of the letter of Mr. Ackerman as of February 6, 1945. In the intervening year, until the date of settlement March 8, 1946 Mr. Fog was repeatedly assured and impressed with the fact that he was not entitled to commissions. It was in this intervening period that whatever impressions of "profit" that Mr. Fog may have had were wiped out or nullified. For that reason the fact that he once was informed that Williams & Co. were "making" \$1.00 per case should have little or no effect upon the trial, or this court, in deciding the issues of this case. It was a small circumstance but apparently a major one with the trial court but if truly and fairly evaluated it was certainly not such "substantial evidence" as a basis for sustaining the trial court's decision.

True the trial court also grasped upon the fact that Mr. Fog knew that Harwood Whiskey appeared in his territory through the offices of Williams & Co. But that fact was not inconsistent with the representations and explanations given him, in an effort to convince him that he was not entitled to commissions. Nor is this fact such "substantial evidence" as to warrant an affirmance of the judgment.

Eliminate these two factors and nothing remains to support the decision of the trial court. Both of these "factors" are inconsequential and of small cir-

cumstance and certainly do not justify a denial of the relief prayed for by plaintiff.

The courts should not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been defrauded.

Victor Oil Co. v. Drum, 184 Cal. 226, 241;

Simmons v. Briggs, 69 Cal. App. 447, 464;

Rutherford v. Rideout Bank, 11 Cal. (2d) 479, 485.

The trial court stated, as this court pointed out, "The damage to him arises not by virtue of the manner in which the contract was made between the distiller and the supplier; the damage arises because of the introduction and the disposition and the distribution of the liquor in his territory. That is what causes him his damage." The court's meaning is not clear to us, but if we accept that statement according to its common and ordinary sense it proves that the trial court did not comprehend the issues of the case.

It certainly did make a difference as to how the whiskey was sold and handled. The manner in which the contract was made between the distiller and the supplier is the decisive factor in determining Mr. Fog's right to a commission. There could be many arrangements between the distiller and the supplier which would foreclose Mr. Fog's right to a commission. However, under the actual and existing arrangement, which we proved at the trial, Mr. Fog was entitled to his commission. Even the trial court admitted that. (R. 296.)

The effect of the misrepresentations and why it made a difference to Mr. Fog may best be exemplified by quoting Mr. Fog's testimony under examination of defendant's counsel (see R. 207):

"A. I found out that R. C. Williams' representations that they were just clearing the merchandise was absolutely contrary to the fact that inasmuch as they did not import the merchandise on behalf of the distillery, they imported it for themselves, owned the merchandise after it arrived in this country, bought it at one price and billed it at another and made a profit on it, that was contrary to my understanding of clearing it.

Q. What difference would it make to you in your position whether they did it one way or another?

A. The difference to me is whether I was to receive a commission or not, because if they sold the merchandise and shipped it into my territory, I was guaranteed a commission on such sales, but if they were only acting on behalf of the distillery and just making a commission themselves, then it might be possible that I am not entitled to it."

The logic of that statement is clear. He was at all times informed that Williams & Co. was doing the invoicing, billing and clearing as a matter of accommodation for the distillery. They denied that they ever sold it—that word was never used. (R. 263.) The true explanation and real facts were never given Mr. Fog.

We therefore maintain that before Mr. Fog should be bound by the settlement he was entitled to know all the real facts of the situation. He was, at the time

of entering into the settlement, entitled to knowledge of all the circumstances of the transaction so as to enable him to ascertain and know with certainty what his rights were.

“If, as the evidence shows, the real facts were concealed from him by one from whom he had a reason to expect a frank disclosure of all the material circumstances as they occurred, he is not for that reason—no rights of innocent third parties having intervened—to be denied the fullest relief to which according to the principles of equity he is entitled.”

Dickson v. Patterson, 160 U.S. 586; 40 L. ed.

543.

A person upon whom fraud has been practiced has a right to understand *all* of the facts and circumstances, and be fully advised of his rights, before beginning suit—especially if no rights of third parties have intervened. To deny him relief it must be shown that Mr. Fog had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach. Indeed, his knowledge of the real facts which shall prevent his relying on or being misled by *it must be clearly and conclusively established by the evidence.*

West v. Great Western Power Co., 36 Cal. App.

(2d) 403, 414;

Dickson v. Patterson, 160 U.S. 586; 40 L. ed.

546;

Pence v. Langdon, 99 U.S. 578; 25 L. ed. 420.

The conduct of the defendant throughout the entire history of this transaction has not been such as to commend it to the favor of a court of equity. Under the circumstances every doubt and difficulty should be resolved against defendant.

Providence Rubber Co. v. Goodyear, 9 Wall. 788; 19 L. ed. 566.

He who practices bad faith ought not to be permitted to invoke the doctrine of constructive or imputed notice in aid of his wrong doing unless negligence on the part of the injured party supervened.

West v. Great Western Power Co., 36 Cal. App. (2d) 403, 408.

The decision of the trial court in this case is not supported by such substantial evidence sufficient to sustain the court's finding that plaintiff was informed of *all* the material facts when he executed the compromise agreement. The two "facts" upon which the trial court relied were of little real significance and their importance, if any, was nullified and destroyed by the overwhelming mass of misrepresentation *subsequently* made to Mr. Fog right up to the signing of the settlement agreement.

As we understand the effect of the decision of the trial court it is that a party actively engaged in a consummate fraud need only reveal one or two half truths, then submerge or wipe out these half truths subsequently with a mass of falsehoods and untruths and the defrauded party will be deprived of any relief by a court of equity.

Truly the decision in this case places a premium on dishonesty and invites aggression.

For the foregoing reasons we respectfully urge this court to grant a rehearing in this matter.

Dated, San Francisco, California,

February 24, 1950.

RICHARD TUM SUDEN,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
February 24, 1950.

RICHARD TUM SUDEN,
*Counsel for Appellant
and Petitioner.*

